United States Court of Appeals

for the Second Circuit

APPENDIX

76-1453

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *

Appellee, *

-against- *

ERIC DANIELS, DON DANIELS, AND KENNETH BROWN, *

Appellants. *

Docket No.
76 Cr. 1453

B
PMS

On Appeal from the United States District Court
For the Southern District of New York

JOINT APPENDIX

ROBERT SCHMUKLER
Attorney for Appellant,
KENNETH BROWN.

LAWRENCE H. LEVNER
Attorney for Appellant,
ERIC DANIELS

DON DANIELS
Appearing pro se

PAGINATION AS IN ORIGINAL COPY

INDEX TO THE APPENDIX

PAGES

The defendant adopts the argument of co-defendant appellants as if they were his own.

2- DANIEL, ERIC
ted as DANIELS, ERIC

Mo. 05 Day 13 | 76 Yr | 0476 Docket No.
No. of Def's *05 | JUVENILE | MIDDLE

U.S. MAG. CASE NO. ▶ 76-552

OFFENSES CHARGED		ORIGINAL COUNTS
18:371	Consp. to commit offenses against U.S.	1
18:2114 & 2	Robbery of P.O. with dangerous weapon.	2,3
18:500 & 2	Possess. of stolen money orders.	4

BAIL • RELEASE
Denied | AMT Set | Fugitive | Pers. Recog | PSA
$ 000
Conditions
Date
10% Deposit | Surety Bond | Collateral | 3rd Pty Cust | Other
Bail Not Made | Status Changed (See Docket)

SUPERSEDING COUNTS

DATES & PRELIMINARY PROCEEDINGS | ARRAIGNMENT | TRIAL | SENTENCE

5:00 p.m. 5/1/76	5-13-76	5-20-76	6-21-76	6-29-76
		5-30-76	6-4-76	9-21-76
		X	6-29-76	On All Charges / On Lesser Offense(s)

Deposition Completed | Dismissed | WOR | WR | On Government's Motion

MAGISTRATE

	DATE	INITIALING	OUTCOME
Search Warrant Issued / Returned			
Summons Issued / Served			
Arrest Warrant Issued / COMPLAINT	5/3/76	HJR 080D	
INITIAL APPEARANCE DATE ▶	5/3/76	HJR 080D	DISMISSED
PRELIMINARY EXAMINATION / REMOVAL HEARING Date Concluded	5/13/76		HELD FOR G.J. OR OTHER PROCEEDING IN THIS DISTRICT
WAIVED / NOT WAIVED	Case Number		HELD FOR G.J. OR OTHER PROCEEDING IN DISTRICT BELOW
OFFENSE DATE			

18 USC 500; 2 - FORGERY OF POSTAL MONEY ORDERS

U.S. Attorney or Asst.: William J. Kelleher, Jr. 791-1991

ATTORNEYS — X — Bail Waived | Self | None / Other | Ppd | Elect

~~Julian Linker 225 Bdwy, NYC 10007 -- 233-5370~~
Lawrence Lenner 521 - 5th Ave. NYC 10017 after indictment

* Show last names and suffix numbers of other defendants on same indictment/information

01-BROWN,02-DANIELS,04-DIAZ

DATE	PROCEEDINGS	EXCLUDABLE DELAY (a)	(b)	(c)
5/3/76	Complaint filed, Legal Aid assigned for bail only. Defendant remanded into the custody of U.S. Marshal in lieu of $50,000 cash or surety.			
5/13/76	Indictment filed, 76 Cr. 476			
5-20-76	Deft.(Atty. present) enters plea of not guilty. Bail continued as fixed $50,000. Deft. remanded. Case assigned to Judge Goettel. Atty. to report to chambers immediately. MacMahon,			
5-24-76	Filed defts. notice of appearance by: Julian Linker of 225 Bdwy,NYC 10007.			
05-28-76	Atty. present - Motion to reduce bail granted. Bail reduced from $50,000. cash or surety to $25,000. cash or surety. Trial date set for 6-21-76 at 10 AM -- Goettel, J.			
06-09-76	Filed Covernments notice of readiness for trial.			
06-07-76	Filed CJA appointment (copy #5) appointing Lawrence Lenner as attorney of record -- after indictment. -- Goettel, J.			
06-07-76	Filed defts financial affdvt.			

DATE	IV PROCEEDINGS (continued) (DOCUMENT NO.) PAGE TWO	V EXCLUDABLE DELAY Interval (a)	Start Date End Date (b)	Ltr. Code (c)	Total Days (d)
6-10-76	Filed govts. affdt. and notice of motion for an order directing deft. to provide handwriting samples ,etc,ret. on: June 14,1976 at 10am.				
6-10-76	Filed govts. memorandum of law in support of above motion.				
6-15-76	Filed ORDER--ORDERED that deft. shall give a handwriting sample to agents of the US Postal Service on June 14,1976. So ordered, Goettle,J. m/n				
6-22-76	Filed govts. memorandum of law in opposition to defts. mtix motion for suppression .				
5-24-76	Filed magistrate!s papers: docket sheet; complaint filed on 5/3/76;disposition sheet; andnotice of appearance by Legal Aid Society (for bail only)				
6-21-76	Motion to sever deft. SYLVIA DIAZ is granted on consent of the govt. Goet				
6-21-76	Jury trial begun. Goettel,J.				
6-22-76	Jury trial contd.				
6-23-76	"				
6-24-76	"				
6-25-76	"				
6-28-76	"				
6-29-76	" and concluded. Jury finds deft. GUILTY on all cts.(1 thru 4). PSI ordered. Date of sentenc e adj. to Ag . 11,1976 at 2pm. in Rm.506. Bail increased by court to $50,000 cashor surety as to deft. Deft. contd. remanded in lieu of bail Goettel,J.				
8-23-76	Filed transcript of record of proceedings, dated 6-21, 22, 23, 24 1976				
8-23-76	Filed transcript of record of proceedings, dated 6-25, 28, 29, 1976				
9-2-76	Filed Transcript of record of proceedings, dated 6-14-76				
9-21-76	Filed JUDGMENT(atty. Lawrence Leyner,present)--the deft. is hereby comitted to the custoyd of the Atty General or his authorized repfesentative for imprisonment for a period of THREE(3) YEARS on ct.1 and FIVE(5) YEARS on ct.4 to run consecutively with each other; TWENTY-FIVE(25) YEARS on cts. 2 & 3. The execution of sentence on cts. 2 & 3 is suspended and the deft. is placed on unsupervised probation for a period of ONE(1) DAY. Deft. to be credited with time already served. Deft.notified of his right to appeal and the deft. is remanded. The court orders commitment to the custody of the atty. general and recommends thatthe deft. be placed at the Federal Correctional Institution at Lexington,Ky. Goettel,J.(copies issued)				
9-21-76	Filed defts. notice of appeal to the USCA from the final judgment entered on this date. Copies issued to US Atty's. Office and to Deft. at MCC,150 Park Row,NYC.Deft. given leave to file his appeal in forma pauperis. Goettel,J.				
9-24-76	Filed govts. sentencing memorandum.				
9-27-76	Filed transcript of record of proceedings dtd. 8/2x 8/18/76.				
9-28-76	Filed temp. co mitment dtd. 5/3/76.(unexecuted)				

DATE	RECEIPT NUMBER	AMOUNT	DATE	RECEIPT NUMBER	C.D. NUMBER

MK:ow
1-1979

76 CRIM 0476

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA, :

- v - : INDICTMENT

ERIC DANIELS, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman", and PATRICIA BOOTH CORNWALL, : 76 Cr.

Defendants. :

- -X

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of April, 1976 up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, ERIC DANIELS, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman", and PATRICIA BOOTH CORNWALL, the defendants, unlawfully, wilfully, and knowingly, did combine, conspire, confederate, and agreed together and with each other and with others to the grand jury known and unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 2114 and 500.

2. It was part of said conspiracy that ERIC DANIELS, DON DANIELS, and KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman", and PATRICIA BOOTH CORNWALL, the defendants, unlawfully, wilfully, and knowingly, would, with intent to rob, steal and purloin mail matter, money, United States Postal money orders and other property of the United States, assault and by the use of

dangerous weapons put in jeopardy the lives of persons having lawful charge, control and custody of such mail matter, money, United States Postal money orders and other property of the United States.

3. It was further a part of said conspiracy that ERIC DANIELS, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman", and PATRICIA BOOTH CORNWALL, the defendants, would rob persons having lawful charge, control and custody of mail matter, money, United States Postal money orders and other property of the United States.

4. It was further a part of said conspiracy that ERIC DANIELS, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman", and PATRICIA BOOTH CORNWALL, the defendants, would receive and possess a quantity of blank money order forms which had been provided by and under the authority of the United States Post Office Department and Postal Service, with the intent to convert said money orders to their own use and gain and to the use and gain of others, knowing said money orders to have been embezzled, stolen and converted.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about the 29th day of April, 1976, DON DANIELS and PATRICIA BOOTH CORNWALL prepared a list of equipment to be used for the robbery of a United States Post office.

WJK:ow
n-1979

2. On or about the 29th day of April, 1976, DON DANIELS and PATRICIA BOOTH CORNWALL prepared a diagram of the floor layout of the interior of a United States Postal Station.

3. On or about the 30th day of April, 1976, DON DANIELS, ERIC DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine" and PATRICIA BOOTH CORNWALL had a conversation about the robbery of a United States Postal Station.

4. On or about the 1st day of May, 1976, ERIC DANIELS, DON DANIELS, and KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine" entered the United States Hell Gate Postal Station, 153 E. 110 St., New York, New York.

5. On or about the 29th day of April, 1976, PATRICIA BOOTH CORNWALL and SYLVIA DIAZ, a/k/a "Sylvia Blackman" had a conversation on the telephone.

6. On or about the 1st day of May, 1976, ERIC DANIELS, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman" entered a basement apartment at 22 W. 121 St., New York, New York.

7. On or about the 1st day of May, 1976, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman" were present at a meeting at a basement apartment, 22 West 121 St., New York, New York.

(Title 18, United States Code, Section 371).

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n-1972

COUNT TWO

The Grand Jury further charges:

On or about the 1st day of May, 1976, in the Southern District of New York, ERIC DANIELS, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman", and PATRICIA BOOTH CORNWALL, the defendants, unlawfully, wilfully and knowingly did rob mail matter, money and other property of the United States, from several United States Postal Service employees then employed at the Hell Gate Postal Station, 153 E. 110 St., New York, New York, to wit, approximately $301,200.00 in United States Postal money orders, $1,642.56 in United States Currency and United States Postage and other mail matter and property of the United States, which was then in the lawful charge, control and custody of said employees.

(Title 18, United States Code, Sections 2114 and 2).

COUNT THREE

The Grand Jury further charges:

On or about the 1st day of May, 1976, in the Southern District of New York, ERIC DANIELS, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Cardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman", and PATRICIA BOOTH CORNWALL, the defendants, in effecting and attempting to effect the robbery set forth in Count Two of this indictment unlawfully, wilfully and knowingly, did put several United States Postal Service employees' lives in jeopardy by the use of dangerous weapons, to wit, a hand gun and a rifle, said employees having custody of mail, money, and other property of the United States.

(Title 18, United States Code, Sections 2114 and 2).

[illegible]
[illegible]-197[illegible]

COUNT FOUR

The Grand Jury further charges:

On or about the 1st day of May, 1976, in the Southern District of New York, ERIC DANIELS, DON DANIELS, KENNETH BROWN, a/k/a "Gene", a/k/a "Gardine", SYLVIA DIAZ, a/k/a "Sylvia Blackman", and PATRICIA BOOTH CORNWALL, the defendants, did receive and possess a quantity of blank money orders forms which had been provided by and under the authority of the United States Post Office Department and Postal Service, to wit, approximately 1004 United States Postal money orders valued at approximately $301,200.00, with the intent to convert said money orders to their own use and gain and use and gain of others, knowing said money orders to have been embezzled, stolen, and converted.

(Title 18, United States Code, Sections 500 and 2).

FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

T4 pm

THE COURT: I think if the search warrant rested upon the second entry, the one where the battering ram was used, regardless of the bona fides of their motivations and whether or not someone was believed to be inside, we might have a difficult legal problem.

However, all the evidence so far has been to the effect that the warrant rested solely upon Mr. Monroe's initial entry in the company of a woman earlier.

While all defense counsel have continually said that Mr. Monroe does not know how he got in, that's only literally true to the extent that he's uncertain as to what order the three of them entered the apartment and who opened the door or whether or not it was closed.

In terms of how he effected his entry, the evidence was quite clear that it was effected pursuant to prearrangements made by his lady companion with one of the occupants of the apartment, that he was met at the gate by one of the occupants and that he was admitted voluntarily

So I deny the motion to suppress.

(Jury impaneling continued)

THE COURT: Members of the jury, you are about to enter upon your final duty, which is to decide, as I have told you several times, the fact issues in the case. I told you at the start of the trial that your principal function during its progress would be to listen carefully and to observe each witness as he testified.

You are to perform your final duty in a complete attitude of fairness and impartiality. You are to appraise the evidence calmly and deliberately and, as was emphasized by me at the time you were first selected as jurors, without the slightest bias or prejudice for or against the government or the defendants as parties to this litigation.

Let me add that the fact that the government is a party entitles it to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, governments and individuals, stand as equals before the bar of justice.

Your final role is to pass upon and decide the fact issues. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of witnesses, you resolve such differences as there may be in testimony and you

draw whatever reasonable inferences you may find warranted by the facts as you determine them.

My function at this point is to instruct you as to the law. It is your duty to accept these instructions of law and to apply them to the facts as you find them. The logical result of that application is the verdict in this case.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel either for the government or for the defendants may have said with respect to matters in evidence or as to any factual matter, whether stated in a question, in argument or in summation, is not to be substituted for your own independent recollection of the evidence.

It is the duty of the attorneys for each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the court does not, unless expressly stated, indicate an opinion as to the weight or respect of such evidence. As stated

before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely and may draw no inference from the wording of it, or speculate as to what the witness would have said if he had been permitted to answer any question.

So, too, anything that the court may have said during the progress of the trial or may say during the course of these instructions with respect to any fact matter again is not to be taken in substitution of your own recollection as to any factual matter.

The case must be decided, and this I told you at the time of your selection as jurors, upon the sworn testimony of the witnesses and such exhibits as were received in evidence.

Now, there are certain principles of law which apply in every criminal case and which likewise I have made reference to and emphasized at the time of your selection as jurors. I will repeat them now.

The indictment upon which the defendants are brought to trial is merely an accusation, a charge. It is no proof or evidence of the defendants' guilt. No weight is to be given to the fact that a grand jury returned the

indictment against the defendants. They have pleaded not guilty. Thus, the government has the burden of proving the charges against them beyond a reasonable doubt. It is a burden that never shifts and remains upon the government throughout the entire trial.

b2

The defendants do not have to prove their innocence. On the contrary, they are presumed to be innocent of the charges contained in the indictment. This presumption of innocence was in their favor at the start of the trial, continued throughout the trial and is in their favor as I instruct you at this point and even continues in their favor during the course of your deliberations in the jury room. It is removed only if and when you, the members of the jury, are satisfied that the government has sustained its burden of proving the charges beyond a reasonable doubt.

The question then that naturally comes up is what is a reasonable doubt. The words almost define themselves. It is a doubt founded in reason and arising out of the evidence or lack of evidence in the case. It is a doubt which a reasonable person has after carefully weighing all of the evidence.

Reasonable doubt is a doubt which appeals to your reason, your common sense, your experience and your judgment. It is not caprice, whim or speculation. It is

not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for the defendants.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of any defendant's guilt, that you do not have an abiding conviction of that defendant's guilt--in sum, if you have such a doubt as would cause you as a prudent person to hesitate before acting in matters of importance to yourselves -- then you have a reasonable doubt; and in that circumstance it would be your duty to acquit.

On the other hand, if, after such an impartial and fair consideration of all the evidence, you can candidly and honestly say you do have an abiding conviction of the defendant's guilt or any defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and in that circumstance it would be your duty to convict.

One final word on this subject. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few men, however guilty they might be, would be convicted. It is practically impossible for a person to be absolutely and completely

convinced of any controverted fact which by its nature is not capable of determination with mathematical precision. In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Your verdict must be separate and independent as to each defendant. It is your duty to give separate, personal consideration to each defendant. You should analyze what the evidence in the case shows as to each alone. Each is entitled to have his case determined from the evidence which, under the rules given to you now, may be applicable to him.

The jury is at liberty to find one or more of the defendants guilty and the others not guilty.

The guilt of one person named in this indictment creates no presumption of the guilt of any other

Each of the defendants is to be considered separately by the jury. While it is true that they are being tried together, their cases must nevertheless be considered separately and likewise determined.

The guilt of any one of the defendants must be determined on facts which show the part he had in the commission of the crime or crimes charged in the indictment, not upon the guilt of any other defendant or co-conspirator.

With the foregoing general instructions in mind, let us turn to the indictment.

Count 1 charges that from on or about the 1st day of April, 1976, the defendants unlawfully, wilfully and knowingly did combine, conspire, confederate and agreed together and with each other and with others to the grand jury unknown to commit offenses against the United States, and that it was part of this conspiracy that the defendants unlawfully, wilfully and knowingly, would, with intent to rob, steal and purloin mail matter, money, United States postal money orders and other property of the United States, assault and by the use of dangerous weapons put in jeopardy the lives of persons having lawful charge, control and custody of such mail matter, money, United States postal money orders and other property of the United States, and that it was further a part of the conspiracy that the defendants would rob persons having lawful charge, control and custody of mail matter, money, United States postal money orders, and other property of the United States, and would receive and possess a quantity of blank money order forms which had been provided by and under the authority of the United States Post Office Department and Postal Service, with the intent to convert said money orders to their own use and gain and to the use

and gain of others, knowing said money orders to have been embezzled, stolen and converted.

A number of overt acts are charged, including the preparation of a list of equipment to be used on April 29, 1976, by Ms. Cornwall and Don Daniels, the preparation of a diagram at the same time, a number of conversations are alleged, including on Aprl 30, 1976, between

b3 all of the defendants concerning the robbery.

Moreover, it is charged that on the 1st day of May the three male defendants on trial here before you entered the United States Post Office at Hell Gate Station and that on the same day the three of them along with Sylvia Diaz entered a basement apartment at 22 West 121st Street, New York, and that a meeting occurred on that date between them or, more accurately, between Don Daniels, Kenneth Brown and Sylvia Diaz.

Section 371 of Title 18, under which this charge is brought, provides in relevant part:

"If two or more persons conspire...to commit any offense against the United States...and one or more of such persons do any act to effect the object of the conspiracy, each (such person commits a crime which is separate and distinct from the offense or offenses which were the object of the conspiracy)."

In order to find the defendants guilty under count 1 in the indictment, you must find beyond a reasonable doubt:

First, that at some time during the period from on or about April 1, 1976, up to and including May 13, 1976, a conspiracy existed;

Second, that the conspiracy had as its objects the theft of mail matter, money, United States postal money orders and other property of the United States, the robbing of persons having lawful charge, control of custody of mail matter, money, United States postal money orders and other property of the United States, and the use of dangerous weapons so as to put in jeopardy the lives of such persons;

Third, that the defendants knowingly associated themselves with the conspiracy; and

Fourth, one of the co-conspirators knowingly committed at least one of the overt acts set forth in the indictment at or about the time and place alleged.

As to the first element, a conspiracy is a combination or agreement of two or more persons by concerted action to accomplish some unlawful purpose or a lawful purpose for unlawful means. It has been referred to somewhat loosely as a partnership in crime.

Mere approval of a crime before the event is not sufficient in itself to charge one with being a co-conspirator in the commission of a crime.

The gist of the crime is the combination or agreement. The offense is complete when the combination or agreement is made and when any single overt act to effect the object of the agreement is thereafter performed. Whether or not the conspirators actually accomplished what they conspired to do is immaterial.

Moreover, it is not necessary in order to establish a conspiracy that there be evidence that the persons involved entered into a formal agreement. It is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to accomplish an unlawful design, knowing its object.

In determining whether an unlawful conspiracy existed, you will consider the evidence as to the acts and conduct of the alleged co conspirators. If the proof convinces you beyond a reasonable doubt that the minds of these persons met so as to bring about a deliberate agreement to do the acts charged, it is sufficient proof of the existence of a conspiracy.

Mere suspicion is not enough, neither is naivete. You must be satisfied beyond a reasonable doubt that the

defendant consciously associated himself in a conspiracy with specific criminal intent and consciously sought to have the conspiracy accomplish its criminal purpose.

A conspirator need not have originally conceived the plan nor have participated in it from its beginning, nor have taken part in each and every step or action in its furtherance, or have knowledge of all its operations.

If a defendant is, in fact, a knowing and wilful party to the conspiracy, he is equally culpable with the other parties even though his participation may be more limited than that of his co-conspirators. It is not even necessary that all the conspirators know each other. One conspirator may know only one other member of the conspiracy.

As to the third element, that is, whether the defendant was wilfully and knowingly a party to the conspiracy, wilfully means with a bad and evil purpose to do that which the law forbids. Knowingly means intentionally as contrasted with negligently or inadvertently.

In order to join a conspiracy knowingly and wilfully, a defendant must know that the purpose of the conspiracy was that alleged in the indictment and he must intend to carry out that purpose. In considering this element of the offense, that is, the element of a defendant's knowledge and intent, you must determine what was in the

defendant's mind. Since it is not possible to look directly into a man's mind to see what is there. What he knows or what he intends, you must determine this question on the basis of evidence which you find to be believable as to what he said and what he did and as to the circumstances under which he said and did these acts.

If you find that a conspiracy existed and that a particular defendant was a knowing and wilful party to it, then the acts and declarations of any other member of the conspiracy during the pendency of the conspiracy and in furtherance of its objectives are binding upon him just as though he had planned the acts or made the declarations himself.

On the other hand, acts and statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination are evidence only against that person alone.

As to the fourth element, the overt acts, an over act need not be in itself a criminal act. It can be any act, such as, for example, meeting a person, as long as it is an act performed in furtherance of the conspiracy. The government need not prove that all the overt acts alleged in the indictment were performed. It is sufficient if it proves one of them.

It is not necessary that the government prove that the conspiracy existed throughout the entire period alleged in the indictment, in this case beginning on April 1, 1976. It is sufficient if it proves that the conspiracy existed for a substantial part of that period.

The counts in the indictment and the overt acts charge that the acts involved occurred on or about certain dates. It does not matter if a specific transaction is alleged to have occurred on or about a certain date and the testimony indicates that, in fact, if you find that it

b4 did occur, it was on another date.

The law only requires a substantial similarity between the dates alleged in the indictment and the dates established by the testimony.

If, upon all the evidence that you believe and consider relevant, you are satisfied that the government has proved beyond a reasonable doubt each of the elements of the crime of conspiracy which I have explained to you, you will return a verdict of guilty. If you are not so satisfied, you will return a verdict of not guilty.

If you are satisfied beyond a reasonable doubt that the conspiracy described in the indictment existed between at least one of the defendants and a co-conspirator, you must then consider the evidence relating to each defendant

separately and decide whether that evidence proves beyond a reasonable doubt he was a member of the conspiracy or whether it does not.

In deliberating on this question of a defendant's knowing participation of membership in the conspiracy, you must consider the evidence as to that defendant individually. You must confine your deliberations to the independent evidence as to his own actions, his own conduct, his own statements or declarations, and the reasonable inferences to be drawn from such independent evidence.

Turning now to counts 2 and 3 of the indictment.

Count 2 charges that on or about May 1, 1976, the defendants unlawfully, wilfully and knowingly did rob mail matter, money and other property of the United States from several United States Postal Service employees then employed at the Hell Gate Postal Station, 153 East 110th Street, New York, to wit, approximately $301,200 in United States postal money orders, $1,642.56 in United States currency and United States postal and other mail matter and property of the United States, which was then in the lawful charge, control and custody of said employees.

Count 3 states that in effecting and attempting to effect the robbery set forth in count 2 of this indictment the defendants unlawfully, wilfully and knowingly did put

several United States Postal Service employees' lives in jeopardy by the use of dangerous weapons, to wit, a hand gun and a rifle, said employees having custody of mail, money and other property of the United States.

This is charged as a violation of Section 2114 of Title 18, United States Code, which reads in pertinent part:

"Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States...; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon (commits a crime)..."

In order to find the defendants guilty under count 2 in the indictment, you must find beyond a reasonable doubt:

First, that on or about the date specified in the indictment, one or more of the postal employees in question had lawful charge, control or custody of mail matter,

money, United States postal money orders, and other property of the United States; and

Second, that the defendants actually did rob one or more of said employees of such mail matter, money, United States postal money orders, and other property; or, that he wilfully aided and abetted another to do so.

In order to find the defendants guilty under count 2 in the indictment, you must find that one or more of the postal employees in question had lawful charge, control or custody of the mail matter, United States postal money orders, and other property of the United States. Control may be demonstrated by the ability of a person to dictate the movement of property. A person in custody of physical property is entrusted with responsibility and control over its disposition.

Another element that must be found beyond a reasonable doubt under count 2 is that a robbery occurred Robbery is the taking of property in the possession of another from his person or immediately presence and against his will, which taking is accomplished by means of force or fear.

In order to find the defendants guilty under count 3 in the indictment you must find that the defendants committed the crime charged in count 2. In addition, you must

find beyond a reasonable doubt that in effecting or attempting to effect said crime, the derendants wilfully put one or more of their lives in jeopardy -- and by "their" I mean the postal employees -- by use of a dangerous weapon; or, that they wilfully aided and abetted another to do either of these acts.

In determining whether the defendants put a person's life in jeopar y the use of a dangerous weapon, you are to apply a completely objective test; more is required than the victim's fear, but the fact that the holder of the weapon did not intend to place lives in jeopardy will not negate the offense. The critical question is whether a life is actually placed in dange You jurors must determine this from all the facts and circumstances appearing from the evidence. The use of a weapon in effecting robbery of the mails, absent any other circumstances, allows a finding that such weapon was capable of p/acing life in actual danger and jeopardy.

Take 8 p.m.
harge

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In other words, this Court takes judicial notice that apparently operable revolvers and rifles are "dangerous weapons" within the meaning of Section 2114. When such weapons are employed, as here, by pointing them at innocent persons and such pointing is accomplished by threats of death, absent compliance with illegal demands, such acts without more may constitute evidence from which a jury could properly infer that the person against whom they were directed were placed in jeopardy wtihin the meaning of the statute.

Shortly, I will say more about the element of aiding and abetting.

Now, the Fourth Count of the indictment charges that the defendants did receive and possess a quantity of blank money order forms which had been provided by and under the authority of the United States Post Office Department and Postal Service, to wit, approximately 1,004 United States Postal money orders valued at approximately $301,200, with the intent to convert said money order to their own use or gain, or use or gain of another, knowing said money orders to have been embezzled, stolen or converted. This being a violation of Section 500 of Title 18.

The pertinent part of which reads:

"Whoever embezzles, steals or knowingly converts to his own use or to the use of another or without authority

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converts or disposes of any blank money order form provided by or under the authority of the Post Office Department or Postal Service," commits a crime.

It goes on to provide:

"Whoever receives or possesses any such money order form with the intent to convert it to his own use knowing it to have been embezzled, stolen or converted," also commits a crime.

It is this second provision of Section 500, the possession of stolen money orders, which is the basis of the charge in the indictment against the defendants.

Before you may find the defendants guilty you must find that each of the following four elements have been proven beyond a reasonable doubt:

First, that on or about May 1, 1976, the defendants willfully and knowingly had in their possession blank money orders of the United States Postal Service;

Second, that the money orders had been stolen from the Postal Service;

Third, that the defendants knew when they possessed them that the money orders had been stolen or embezzled or converted;

Fourth, that the defendants inteneded to use the money orders for their own gain or the gain of another.

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The second fact you must find beyond a reasonable doubt in order to convict is that the defendants in question received or possessed stolen money orders.

You may make such a finding if you conclude that the defendants possessed stolen money orders either physically or constructively.

Physical custody of the money orders obviously meets this requirement. In addition, one who does not have actual physical custody of such property is said to possess it constructively if he exercises dominion or control over it. Such control may be demonstrated by the existence of a working relationship between the person having such control and the person with actual physical custody of the property or by the ability of such person to dictate the movement of the property.

Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which the jury may reasonably draw the inference that the person in possession knew the property had been stolen. Though this inference is only prima facie evidence of guilt, it may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.

Indeed, possession of property recently stolen, if not satisfactorily explained, is also a circumstance from which the jury may reasonably draw the inference and find in the light

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of surrounding circumstances that the person in possession participated in some way in the theft of the property, althou theft is not the crime you are concerned with in this charge.

The term "recently" is a relative term which has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all the facts and circumstnaces shown by the evidence.

The longer the period of time since the theft, the weaker the inference which may be drawn from unexplained possession.

Here, the government has produced evidence that the money orders were stolen on May 1, 1976 and that some of the defendants possessed the stolen money orders on that same day.

If you find from the evidence beyond a reasonable doubt that the money orders described in the indictment were stolen, and that, while recently stolen, the money orders were in the possession of the defendants, you would be justified in drawing from those facts the inference that the defendants had knowledge that they were stolen, unless such possession of the money orders by the defendants is explained by facts and circumstnaces which are in some way consistent with the defendants' innocence.

In considering whether possession of recently

stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of constitutional rights the accused need not take the witness stand and testify.

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused.

It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence warrant the inference which the law permits the jury to draw from the possession of recently stolen property.

As part of the first element of the offense, you must also find beyond a reasonable doubt that the objects which the defendants possessed were United States Postal Service money orders.

The second element which the government must prove beyond a reasonable doubt is that the money orders were either embezzled or stolen or knowingly converted.

In order for the government to meet its burden on this element you must find beyond a reasonable doubt that the postal money orders were embezzled, stolen or knowingly converted, not necessarily by the defendants, but by someone.

The government has offered evidence to show that the serial numbers of the blank money orders taken from the United States Post Office, Hell Gate Station, matched the

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serial numbers of the blank money orders which were later allegedly possessed by the defendants.

The third fact that you must find beyond a reasonable doubt is that when the defendants had possession of United States Postal money orders or aided and abetted another person in doing so, the defendants knew that they had been stolen.

You need not find that they knew specifically that the property in question had been stolen from the Post Office, but merely that they knew it had been stolen.

The last element which the government must prove beyond a reasonable doubt, is that the defendants possessed the money orders with intent to convert them to his own use or to the use or gain of another person. This means nothing more than that the defendants intened to cash the money orders and keep the proceeds for themselves or someone else who had no right to the money.

Knowledge and intent exist in the mind. The crime charged in this case requires proof of specific intent before the defendant can be convicted.

Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids, purposely intending

to violate the law.

Since it is not possible to look into a man's mind to see what went on, the only way we have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable, or ordinary consequences of his acts.

The government also relies here on what has been known as the aiding and abetting statute. That statute, Section 2 of Title 18, United States Code, provides as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

If a person aids and abets another in the commission of a crime, he is himself guilty of that crime.

In order to aid and abet another, it is not necessary that a defendant personally perform every act necessary to constitute the offense in the context of this case, which is robbing the Post Office or making an offer for money orders.

But in order to aid and abet another, a defendant must knowingly and willfully, that is, intentionally and with a bad and evil purpose to do that which the law forbids, associate himself with the venture.

He must participate in it as something that he wishes to bring about, that he seeks by his actions to make succeed, knowing the purpose of the venture and knowing that it violates the law.

In addition, the government relies on a theory of law entirely separate and independent of the aiding and abetting statute about which I have just charged you.

It contends that the defendants are guilty of the substantive offenses charged in Counts 2, 3, and 4 in the indictment because they were committed in furtherance of and during the course of the unlawful conspiracy of which the defendants were members.

A conspirator is liable for the acts and statements of his co-conspirators provided they were made within the scope of the unlawful agreement as he saw it, during the

pendency of the conspiracy and in furtherance of its objectives.

To find the defendants guilty of the crime charged under this theory, you must find beyond a reasonable doubt:

First, that another person, in this case Patricia Booth Cornwall, is guilty of the crime charged and was a member of the conspiracy;

Second, that the defendants were members of the conspiracy; and

Third, that the crime was committed in furtherance of the conspiracy or its object.

There have been several photographs and diagrams introduced in this case. The photographs and diagrams of the evidence that are before you are not evidence themselves. They are mere resumes, visual representations of information or data as set forth in the testimony of witnesses or in documents that have been received in evidence. They are no better than the testimony or the documents upon which they are based.

It is for you to decide whether the photographs or diagrams correctly present the data set forth in the testimony and in the exhibits on which they are based.

If you find beyond a reasonable doubt that any defendant used a name other than his own in order to avoid

subsequent identification, that would be a fact from which you may, but need not, infer a consciousness of guilt on his part.

If the government has failed to call a witness who is equally available to both sides, you may not draw an inference that his testimony would have been unfavorable to the prosecution.

Agents of the government have been mentioned during this trial as being on surveillance at the same time and place as certain other agents who testified before you.

You may not draw a presumption against the government from its failure to call witnesses if it should appear to you that their testimony would be merely cumulative or repetitive and of no greater value than that of witnesses who have testified.

The law does not impose upon a defendant the duty to call as witnesses any persons who are shown to have been present at any of the events involved in the evidence or who may appear to have some knowledge of the matters in question.

Both sides have the right to interview witnesses at any time before or during the trial. Both sides have the right to subpoena or request witnesses to appear in court and to pay the witness the statutory fees calculated on the mileage to be traveled to and from court, the number of days

required for attendance in court, and while waiting to be called, and other necessary expenses.

A qualified expert on some technical matter may testify as to his opinion on a subject concerning which he has special knowledge. This is allowed on the theory that the advice of one experienced and versed in technical or special subjects will aid the jury.

You may consider the expert's qualifications and opinion, weigh his reasons, if any, and give his testimony such weight as you feel it deserves.

As previously stated, expert opinion is purely advisory and you may reject it entirely if in your judgment the reasons given for it are not convincing or sound. The determination rests with you, not with the experts.

In considering the testimony of an expert witness which has been admitted in this case, you may consider the factual evidence and, if you find there is any conflict between the opinion of the expert and the facts as found by yourself on which he bases his opinion, you may then disregard the opinion of the expert witness.

One of the government witnesses was a participant in the crimes chargedin the indictment. The government frequently must use such testimony because otherwise it would be difficult or impossible to detect or prosecute wrongdoers.

The testimony of an accomplice is not to be rejected unless the jury thinkgs it has no weight. Like any other fact it is to be taken up and dealt with by the jury, by you who are the triers of the facts.

The evidence of an accomplice is properly considered by the jury. Their testimony must be received with caution and weighed with care.

If a co-conspirator has admitted to false and inconsistent statements and that he has perjured himself under oath, you are instructed that all of his testimony should be closely scrutinized and weighed with great care.

Defendants may be convicted on the uncorroborated testimony of an accomplice.

In determining the weight and consideration of the testimony of an accomplice or co-conspirator, you must consider whether there had been any promise to him or indication of favorable treatment for him or actual benefit conferred, promised or indicated by the circumstances of the case.

Now, the evidence produced in this case established on May 1, 1976 and shortly before 10 o'clock, the United States Post Office, Hell Gate Station, was robbed. Certain postal money orders, coins, stamps and other postal matter were taken.

The evidence also established that later on the same day most of these items were recovered from the basement apartment at 22 West 121st Street in Manhattan.

The government contends that these three defendants were the men who robbed the Post Office or the men who conspired to rob it and were the men who possessed the stolen material after the robbery.

Mr. Kelleher has summarized at some great length the evidence presented by the government.

Through Ms. Cornwall, they established, or attempted to establish, certain conversations and meetings which took place before the robbery and certain preparations that were made.

Through the persons present in the Post Office, they attempted to prove what occurred at the time of the robbery.

Then, through Ms. Stubbington, Postal Inspector Monroe and others, they attempted to establish what happened later in the afternoon when the stolen matter was recovered in the basement apartment.

The defendants urge that the victims of the robbery were totally unable to identify the robbers. Moreover, they argue that these defendants would have been unable to open the vaults which, the manager of the branch, Mr.

Casanovas, has testified he had left partially locked, left but one digit locked.

Ms. Booth of course testified that the manager, contrary to Postal Office procedures, had left the vaults completely open.

One fact you may care to consider in that regard, which was not mentioned by any of the attorneys during their summations, was the testimony that after five of the postal employees had been taken and put back in the vault, and after the vault had been locked, a sixth man came along and was seized by the robbers. But when they attempted to put him in the vault, they were unable to do so because they could not then open the vault which was then locked.

It is the position of at least some of the defendants that the true robbers of the bank were Ms. Cornwall, Mr. Pitner and perhaps Ms. Cornwall's brother, who was also a postal employee.

It is argued on behalf of Don Daniels that his fingerprint was on the stolen materials not because he participated in the robbery, but because he was going to attempt to dispose of the stolen goods and act as a "fence" for them.

All of the defendants attacked the credibility of Ms. Cornwall.

With respect to Mr. Brown, it is argued that he may have picked up the insert. This was done innocently while he was present in the apartment and it is pointed out that his fingerprints did not appear on any of the other stolen material.

With respect to Mr. Eric Daniels, who was the only person as to whom there was any identification testimony given with respect to actually being at the bank, it is urged that Mr. Neeley's identification was not that certain.

Moreover, all of the defendants urge upon you that under the standards of reasonable doubt, there has been inadequate testimony to convict their clients.

There are other contentions urged by the defendants and their lawyers in the summation. You will, of course, consider these as well as all the other evidencein the case, that is, testimony and exhibits.

As I have already told you, all the evidence, whether or not I have adverted to it, is important and must be considered by you.

Now, how do you determine where the truth lies?

I mentioned at the very start of the trial, before you heard a single word of testimony, that it was important for you not only to listen but to look at and observe each witness as he testified. Your determination of the

credibility of a witness very largely depends upon the impresson that he or she made upon you as to whether or not he or she was giving an accurate version of what occurred.

When you walk into this courtroom and sit in the jury box, while the trial is going on or while you are deliberating in the jury room, you have with you your own common sense, your good judgment and your experience.

The degree of credibility to be given to a witness should be determined by his demeanor, his relationship to the controversy and to the parties, and his bias and impartiality, the reasonableness of his statements, the strength or weakness of his recollection, viewed in the light of all other testimony and the attendant circumstances.

A witness may be discredited or impeached by showing that he has made statements which are inconsistent with his present testimony.

Also, at times a witness will testify that an event occurred or that he observed something. Yet, we know from experience that the manner of speaking is such that we can reasonably draw the conclusion that the truth is the exact opposite to what he testified.

In short, what we do, after evaluating the testimony and aperson's giving of testimony, his demeanor, in effect, to use the vernacular, you size the person up the same

as you do whenever you are trying to decide whether one is giving an accurate version of an occurrence such as you might come across in your daily life.

The ultimate question with respect to each witness always is:

Did that witness tell the truth when he appeared before you?

If you find that any witness, and this applies to all witnesses, government and defense, willfully testified falsely as to any material fact, you have a right to reject the testimony of that witness completely or to accept that part or portion which commends itself to your belief or which you may find corroborated by independent testimony.

The defendants have not taken the stand. Under out system of law a defendant is not required to offer any evidence in his own defense.

The fact that a defendant does not take the stand to testify is not to be considered by you in your deliberations in determining the guilt or innocence of the defendant.

In other words, the defendant is not called upon to prove his innocence. The burden is always upon the government to prove the defendant guilty, and to prove it beyond a reasonable doubt.

You are to consider each count separately as if

each were the sole charges against each defendant.

The government to prevail must prove the essential elements of each alleged crime by the required degree of proof, as already explained in these instructions.

If it succeeds, your verdict should be guilty.

If it fails, your verdict should be not guilty.

Thus, you may find any of the defendant either guilty on all counts or you may find him not guilty on all counts or you may find him guilty on some counts or not guilty on the others or vice-versa.

The verdict in the instance of each count must be unanimous.

Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely on the basis of such evidence and these instructions. Under your oaths as jurors you cannot allow consideration of the punishment which may be inflicted upon the defendant if he is convicted to influence your verdict.

They duty of imposing sentence in the event of conviction is solely the responsibility of the Court.

Each juror is entitled to his own opinion. What you are required to do is to go into the jury room and exchange views with one another and review the evidence, listen to the arguments of your fellow jurors, present your views, consult

with one another and reach an agreement solely and only on the evidence, as I have stated it, in accordance with the instructions of law.

If you should have a point of view that differs from that of fellow jurors, you should listen to argument based on the evidence with an open mind.

If you are persuaded that your point of view should yield upon the evidence in the law, there is no reason why you should not change your mind.

However, your final vote must reflect your own conscientious judgment as to how the case should be decided.

You may have brought into the jury room any exhibits you may wish to have sent for. If you need any testimony to be read back, your foreman may send a note that you want specific testimony read.

The first juror, the gentleman on the far left in the front serves as foreman.

If counsel have any exceptions or additions they wish to take up at this time, they may approach the bench.

(At the side bar.)

MRS. BARLOW: Your Honor, I would except to that portion of the Judge's charge which dealt with the aiding and abetting statute. It is my contention the mere charge of a conspiracy in an indictment is not sufficient to satisfy

Rule 7 on aiding and abetting.

THE COURT: That is essentially the same argument you made earlier and I adhere to the same ruling.

MRS. BARLOW: May I just for the record expound on it a bit?

THE COURT: I think you did it adequately before. Unless you are suggesting a corrective charge?

MRS. BARLOW: No. I think that this has to be to some extent a bit clearer. That is, that the law is clear that there can be a conviction on a conspiracy without a conviction on a substantive count.

THE COURT: Certainly.

MRS. BARLOW: The aiding and abetting goes to the substantive counts and must be pleaded out as such.

THE COURT: I am not certain I follow that.

MRS. BARLOW: Simply that--

THE COURT: You are going back to the fact that the extent of aiding and abetting is not spelled out?

MRS. BARLOW: That's right.

THE COURT: That's what I ruled on.

Anything further?

MR. KELLEHER: Judge, I think one think one thing you mentioned, and I don't know if counsel would agree with me, in marshaling the evidence, the vault was closed leaving

the three employees.

THE COURT: Five.

MR. KELLEHER: It wasn't the vault door that was closed, the inner screen door.

THE COURT: That is really what I meant. I will correct it.

MR. KELLEHER: It doesn't matter.

MRS. BARLOW: I think we all referred to it as the vault door.

MR. KELLEHER: On second thought, your Honor, I wish you would.

THE COURT: The inner door and not the outer door.

MR. KELLEHER: The inner door you can see through. I have the minutes, if you want them, I can show them to you.

THE COURT: I know it is the inner door. The question is , have we been referring to the inner door as the vault door?

MR. KELLEHER: No, we haven't.

THE COURT: I will clarify it.

Anything further?

MR. SCHMUKLER: Yes.

MR. LEVNER: Can I take an exception to what's going on?

THE COURT: You don't want me to charge the inner door?

MR. LEVNER: No.

THE COURT: Isn't it the inner door?

MR. KELLEHER: That's Chapman's testimony he is reading.

MR. LEVNER: Who else?

MR. KELLEHER: I think it was clear that they said they stood there, all of the witnesses said they stood there with the doors closed and the door was closed and they could see Bryant being pulled up in front of them. If the vault door was closed, they couldn't see through it.

THE COURT: Sometimes it was called the vault door.

MR. LEVNER: All right.

MR. KELLEHER: The second thing, do you have a charge on circumstantial evidence? Did you give a circumstantial evidence charge? I don't remember hearing it.

THE COURT: What number is that?

MR. KELLEHER: 40.

THE COURT: You're right, that got lost. It got dropped out. I will have to add that right now.

MRS. BARLOW: There was a portion of one of my requests that was going to be included in that.

THE COURT: Okay.

MR. KELLEHER: That is the one with the double inference rule and I referred to cases before. Pfingst and Grunberger and Holland.

THE COURT: We won't give that, then.

MRS. BARLOW: I will except to that ruling.

MR. SCHMUKLER: Your Honor, I except at this time to your Honor's refusal of my requests to charge and I respectfully except to the Pinkerton charge.

THE COURT: All right.

Thank you.

(In open court.)

THE COURT: One factual point has been brought to my attention.

The door which was locked which put the five employees inside the vault so they could not get out was actually a screen-type door that you could see through or bar-type door that you could see through. While some witnesses referred to it as the "vault door," it was not truly the vault door. The vault door being a large metal door which when closed, I think, one of the witnesses said, you couldn't breathe in there after a while.

The door we were referring to or I was referring to in my marshaling of the evidence was the inner door, the

one that you can see through.

Now,there is one particular area of the charge that I omitted accidentally.

We have two types of evidence, direct evidence and circumstantial evidence. I want to explain the difference between these two types now:

Direct evidence is where a witness testified to what he saw, heard or observed. What he knows of his own knowledge. Something which comes to him by virtue of his senses.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence. For in either case, you must be convinced beyond a reasonable doubt of the guilt of the defendants.

At this time we will release the alternate jurors. As you know, we have had three alternate jurors with us

throughout the course of this trial and like substitutes on a baseball or footbal team, we couldn't have played the game without them.

They have been vital to our functioning. If anything had happened to one of the first twelve selected jurors, we could not have gone forward without the alternates.

At this point, they are excused. I don't want the three of you to think that your time was wasted. You served an important function on this jury and I am sure you will be interested in hearing from the other jurors how the deliberations came out.

The three of you, you are now discharged for the rest of the week. You have no more jury service and you will not have to return tomorrow.

(Alternate jurors excused.)

(Marshal sworn.)

THE COURT: You are now about to commence the most solemn and important function of an American citizen. Our democracy affords you certain rights but,as it must, it calls upon you to perform certain duties. Throughout the two hundred years of our liberty we have apprised the right of an accused to have his guilt or innocence to be adjudged by a jury of his peers. This service perhaps has been a burden or inconvenient for you, but it has been essential for

for the administration of justice.

I trust you will be worthy of this important taks.

The jury may retire.

(The jury retired to the jury room to commence deliberations.)

MR. SCHMUKLER: May we inquire as to whether we can go back to our office or wait at this point?

THE COURT: You must wait here. We will consider later on how late we will deliberate and whether or not we will send the jury out. I want you to consider whether if the jury does not reach a verdict tonight you want to request their sequestering.

MR. SCHMUKLER: Is the jury going out for dinner now?

THE COURT: They will not go out for dinner before 6:30, at the earliest.

MR. SCHMUKLER: That's what I wanted to know.

THE COURT: No, not now.

(Recess.)

T9 (At 5:05 P.M. a note was received from the jury.)

(In open court; jury absent.)

THE COURT: All we have at the moment is a request for exhibits. I am told I have to have you here even when I send the exhibits in.

They request the original floor plan drawn by Ms. Booth and they request the photostat of the floor plan.

As you remember, the floor plan is ripped into four pieces. It has writing on both sides. There are two Xeroxes, one of each side.

So I propose to send them all three exhibits.

MRS. BARLOW: No objection.

MR. KELLEHER: Could I offer a little key, your Honor?

THE COURT: Yes.

MR. KELLEHER: The exhibits with the tags up make one side of the drawing and the exhibits with the tags down make the other side of the drawing.

THE COURT: Is it permissible to inform the jury of that?

MR. KELLEHER: It depends on what co-counsel want to do.

MRS. BARLOW: I have no objection. I assume since it's only Mr. Kelleher who put them back together

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again, that he's right.

THE COURT: All right.

They are now asking for a legal definition of conspiracy, first count. They also want coffee.

Bring the jury in. I will charge them on the conspiracy and give them the exhibits.

The defendants are eating now. Do you want to waive their presence during the reading of this part of the charge?

MRS. BARLOW: Yes. I would have no objection if you were to instruct them the same way that you did when we had this experience earlier.

THE COURT: Yes.

(Court's Exhibit 1 marked.)

(Jury present.)

THE COURT: Ladies and gentlemen: The defendants are elsewhere right now. Rather than delay having you come back in, counsel have stipulated that we may go forward without the presence of your clients for the purposes necessary.

The first thing is a request for the original floor plan and for the photostat of the floor plan. This is going to be like putting a puzzle together for you.

As you remember, the floor plan had been ripped

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into four pieces and it has drawings on both sides. The way you put it together is you take the exhibit side which has writing on it and you put all that together. Then when you want to see the other side, you turn it over with the blank side of the exhibit tag and that is the other side put together.

We will give you the Xeroxes of both sides which are probably easier to work from since it puts the pieces together for you.

Your next request is for a legal definition of conspiracy, the first count, and I will read it to you.

A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish some unlawful purpose or a lawful purpose by unlawful means. It has been referred to somewhat loosely as a partnership in crime. Mere approval of a crime before the event is not sufficient in itself to charge one with being a co-conspirator in the commission of a crime.

The gist of the crime is the combination or agreement. The offense is complete when the combination or agreement is made and when any single overt act to effect the object of the agreement is thereafter performed. Whether or not the conspirators actually accomplished what they conspired to do is immaterial.

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Moreover, it is not necessary in order to establish a conspiracy that there be evidence that the persons involved entered into a formal agreement. It is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to accomplish an unlawful design, knowing its object.

In determining whether an unlawful conspiracy existed, you will consider the evidence as to the acts and conduct of the alleged conspirators. If the proof convinces you beyond a reasonable doubt that the minds of these persons met so as to bring about a deliberate agreement to do the acts charged, it is sufficient proof of the existence of a conspiracy.

Mere suspicion is not enough, neither is naivete. You must be satisfied beyond a reasonable doubt that the defendant consciously associated himself in a conspiracy with specific criminal intent and consciously sought to have the conspiracy accomplish its criminal purpose.

A conspirator need not have originally conceived the plan, nor have participated in it from its beginning, nor have taken part in each and every step or action in its furtherance or have knowledge of all its operations. If the defendant is, in fact, a knowing and wilful party to the conspiracy, he is equally culpable with the other

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parties even though his participation may be more limited than that of his co-conspirators. It is not even necessary that all the conspirators know each other. One conspirator may know only one other member of the conspiracy.

I am not reading the entire conspiracy charge, I am taking the abstract elements of it.

In order to join a conspiracy knowingly and wilfully, a defendant must know that the purpose of the conspiracy was that alleged in the indictment and he must intend to carry out that purpose. In considering this element of the offense, that is, the element of defendant's knowledge and intent, you must determine what was in the defendant's mind. Since it is not possible to look directly into a man's mind to see what is there, what he knows or what he intends, you must determine this question on the basis of evidence which you find to be believable as to what he said and what he did and as to the circumstances under which he said and did the acts.

If you find that a conspiracy existed and that a particular defendant was a knowing and a wilful party to it, then the acts and declarations of any other member of the conspiracy during the pendency of the conspiracy and in furtherance of its objectives are binding upon him just as though he had performed the acts or made the

gwh 6

declarations himself.

On the other hand, acts and statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination are evidence only against that person alone.

An overt act need not be in itself a criminal act. It can be any act, such as, for example, meeting a person, as long as it is an act performed in furtherance of the conspiracy. The government need not prove that all the overt acts alleged in the indictment were performed. It is sufficient if it proves one of them.

It is not necessary that the government prove that the conspiracy existed throughout the entire period alleged in the indictment, in this case beginning on April 1, 1976. It is sufficient if it proves that the conspiracy existed for a substantial part of that period.

b2 If, upon all the evidence that you believe and consider relevant, you are satisfied that the government has proved beyond a reasonable doubt each of the elements of the crime of conspiracy which I have explained to you, you will return a verdict of guilty. If you are not so satisfied, you will return a verdict of not guilty.

Does that cover the law of conspiracy that you wish read?

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(At 5:30 P.M., the jury returned to the jury room to continue their deliberations.)

MR. LEVNER: Your Honor, I have an exception to that charge.

THE COURT: It's a little late now.

MR. LEVNER: That's okay.

THE COURT: You are supposed to make your exceptions before the jury retires.

MR.LEVNER: This is not in toto the same charge that was read --

THE COURT: It's not all of the same charge, but there's nothing new there.

MR. LEVNER: Just for the record, your Honor.

THE COURT: All right.

MR. LEVNER: Your Honor, I move for a directed verdict of acquittal based upon that charge with respect to conspiracy. The conspiracy, according to the indictment, states it was alleged to have begun on April 1st, it continued up to and including the time of their apprehension, which would be May 1st.

THE COURT: It says May 13th.

MR. KELLEHER: The date of the filing of the indictment, which is May 13th.

THE COURT: On or about.

MR. LEVNER: For all intents and purposes, the conspiracy ended with the apprehension of the defendants.

THE COURT: Not necessarily. There is law to the effect that so long as the conspirators are attempting to conceal their guilt, the conspiracy continues to exist.

MR. LEVNER: I thought it had ended on May 1st. Therefore, for a substantial period of time there was actually no conspiracy proven since they started the conspiracy on the 26th of April.

THE COURT: That is not my understanding of the law.

As to Ms. Cornwall, she left the conspiracy somewhere the 4th or 5th of May when she abandoned its goals.

MR. LEVNER: I thought you said for a substantial period of time.

THE COURT: The period of time continued under the indictment to May 13th.

MR. LEVNER: You consider that to be a substantial period of time, 17 days?

THE COURT: Yes, considering that the overall conspiracy is alleged to have existed for less than a month and a half.

What you are really pointing out is that the government has the conspiracy starting back on April 1st

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whereas it has no -- what was the date of the visit to the Post Office?

MR. KELLEHER: Two weeks before the robbery.

THE COURT: All right. It has no evidence much before the middle of April that anything was cooking.

MR. SCHMUKLER: Your Honor, on behalf of the defendants may we at this time waive our appearance if the jury requires further exhibits to be delivered to them?

THE COURT: You can certainly do that. If it is only a question of exhibits, you don't want to be here?

MR. SCHMUKLER: No.

THE COURT: Questions you are going to be here for.

MR. KELLEHER: I'm not trying to stand in the way of counsel going to eat or whatever, but I know sometimes problems arise where they say: Give us all of the exhibits that show X.

THE COURT: If it's a request which requires any determination as to which there could be a dispute, I will have to call them back. If they ask for a specific thing, let us say the rolled coins, the revolver, the rifle, something as to which there can be no question, I will send it without calling them back.

Agreed?

MR. SCHMUKLER: Yes, your Honor.

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MRS.BARLOW: Yes, your Honor.

MR. SCHMUKLER: I think the only two exhibits that didn't get into evidence were the photo spread of my client and the individual picture of my client.

THE COURT: The loose coins didn't get into evidence, Eric Daniels' waiver of constitutional rights didn't get into evidence.

MR. SCHMUKLER: I would like to make sure those documents are separated from the rest of the exhibits so they cannot be accidentally sent in to the jury.

THE COURT: Unless Mr. Kelleher wants to invite a mistrial or a reversal on appeal, I am sure he has taken steps in that regard.

MR. KELLEHER: I have no intention of sending them in to the jury. I have no intention of separating them. They are all in numerical orders.

THE COURT: Be careful.

MR. LEVNER: Just housekeeping, your Honor.

The evening dinner break will begin and end at what time, sir?

THE COURT: I am going to let them deliberate at least until 6:30 before sending them.

I think we might as well consider now what your position is as to what we should do if we have no verdict

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by 6:30. Should we send them home, not sequester them, should we send them to dinner, have them back or should we keep them sequestered in the evening?

MR. LEVNER: Could you come back at 6:25 and ask us that question?

THE COURT: Certainly. Just think about it now. Let me know at 6:25 what your preference is.

MR. LEVNER: Fair enough, sir.

THE COURT: All right.

(6:20 P.M. in open court; jury absent.)

THE COURT: The jury has been out for an hour and a half deliberating. It is now 6:25.

They have returned the exhibits they were looking at. As I was speaking, the marshal came out with another note from them which asks to have Pat Booth's testimony of April 30th, Friday night, with K. Brown's arrival -- I guess that mean Kenneth Brown's arrival -- and also testimony by McLeod on coming out of bathroom, primarily a description of man with gun in his hand. They again underscore coffee. They want coffee.

I propose that we bring them in, that we read them these two bits of testimony, but then having done that we have I think three alternatives. We can either excuse the jury for the evening, directing them to return tomorrow,

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or we can ask them if they would like to break for dinner now, or we can direct them to go to dinner now.

I will say that if we sent them to dinner and bring them back to deliberate any more tonight, I think there's no alternative except to put them up at a hotel for the night. Several jurors live 20 or 30 miles away and they couldn't possibly go home after 8 or 9 o'clock, let's say 9 o'clock, and get back here in time for court tomorrow.

So, knowing these things, what do you gentlemen advocate?

MR. KELLEHER: Your Honor, we spoke about it. Maybe I can make a statement and maybe counsel will either agree or disagree.

b3 THE COURT: All right.

MR. KELLEHER: I think I have an idea of what everybody wants.

I think everybody would wish that they be directed to go to dinner at this time and be brought back and continue to deliberate.

THE COURT: All right.

MRS. BARLOW: I think that's a fair and accurate statement, your Honor.

MR. SCHMUKLER: Brought back by 8, 8:30.

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MR. LEVNER: Your Honor, could you direct counsel in the interim to gather together what information they want read back so we can agree on it and then we will present it to the Court at 8:30?

THE COURT: I think we have the reporter here now. The reporter is the person who has to look for it.

(Pause)

THE COURT: This is earlier testimony. We have all that.

MR. LEVNER: Can you repeat the note once more?

THE COURT: You are suggesting we read it to them when they come back?

MR. LEVNER: Yes.

THE COURT: All right.

MRS. BARLOW: The one problem that I have is this: If we continue these latter phases of the procedures without the clients here, I think it will leave a very bad impression on them and it can leave--

THE COURT: I think we should get them back here when the testimony is read.

What I will do now is merely bring the jury in, send them to dinner and tell them when they return we will have read for them these two segments they have requested.

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MRS. BARLOW: May I make a suggestion, your Honor?

MR. LEVNER: Can we direct the clerk to take them out without them appearing?

THE COURT: Sure. Yes, we can do that.

MR. KELLEHER: Judge, insofar as the time, one attorney, and I'm sure he has good reason, said 8:30. It is 6:30 now. That is a bit long.

THE COURT: It's much too long. 8 at the very latest.

All right. Tell the marshal to take them to dinner and tell them they will have the testimony read to them.

MRS. BARLOW: Your Honor, my question was, can we be advised as to where the jury is going to eat so that we don't eat there?

THE COURT: Aldo's. You wouldn't want to eat there anyway.

MR. KELLEHER: Judge, could we have each of the notes that they have given to your Honor marked as Court's exhibits?

THE COURT: All right.

Counsel, I expect you back here at a quarter of 8 so you can advise the reporter what portions are to be read and he can be ready to start reading when the jury is back at 8.

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MRS. BARLOW: Your Honor, we may be able to do it within the next couple of seconds.

MR. KELLEHER: Can I have the note, your Honor?

THE COURT: Yes.

(Court's Exhibit 2 marked.)

THE COURT: All right. You don't need me for your conferences with the reporter, do you?

MRS. BARLOW: No, your Honor.

THE COURT: I will go to dinner myself, I guess.

(8 P.M. in open court; jury absent.)

THE COURT: I take note of the fact that Ms. Barlow and Mr. Levner have not returned. Since they went out to dinner at the same time I did, and I have been back half an hour -- indeed, I saw them going out-- I'm a little puzzled at this. However, we haven't got too much time before the jury comes back.

Can you tell me, Mr. Schmukler, where you and the prosecution disagree over what should be read into evidence?

MR. SCHMUKLER: I think we only disagree in one place, your Honor.

THE COURT: All right. I will arbitrate that right now. Give me the page numbers.

MR. KELLEHER: It starts, your Honor, at

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approximately -- this is the Cornwall stuff.

THE COURT: What page?

MR. KELLEHER: Depending on how you look at it, 582 or 583.

MR. SCHMUKLER: My position, your Honor, is that 582 is not what they are asking for and 583 I think to 589 is what they are asking for.

MR. KELLEHER: I think we both agree on 589. There is a question and the Court says, "Can I see it, counsel, please," and that's the end. That is on 589, your Honor.

Insofar as 583, there is a question on 583. I believe counsel argued it in his summation, although my memory at this point is kind of foggy. I think he argued that the only time she saw him prior to the robbery was on that Friday.

THE COURT: Let me see the note, if you will, please.

MR. KELLEHER: There's a question on page 583 that says, "That was the only time you saw him prior to the robbery, isn't it"?

That's misleading. She says before that, starting on 582, as to when she met him and she knew him.

THE COURT: Let me read the note first.

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(Pause)

MR. KELLEHER: In the interim does the jury have a copy of the indictment, your Honor?

THE COURT: I don't believe so. I don't believe anybody has given them one. I don't believe they have asked for one.

MR. KELLEHER: Is your Honor going to wait until they ask for one or is your Honor going to send one in?

THE COURT: Do you want it sent in?

MR. KELLEHER: I don't know that I have the right to ask. It might move things along a little bit.

THE COURT: We will send a copy of the indictment in after they have heard the testimony read.

"April 30, Friday night, with K. Brown's arrival."

Here they are.

MRS. BARLOW: Your Honor, I apologize for the delay.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: I agree with you that 582 is sort of general background of 583, but, strictly speaking, it's not what they have asked for.

MR. KELLEHER: The one question there, your Honor, and I refer the Court to line 14:

"Q That was the only time you saw him prior to the

gwh 18

robbery, isn't it?

"A Yes."

THE COURT: I think that question as asked, it's meant in terms of with respect to the robbery.

MR. KELLEHER: Right. I know, your Honor. If we just pull it out of context and read it, it is going to be confusing and inaccurate. It was argued to the jury on summation that that was the only time that he was seen.

MR. SCHMUKLER: I argued in that context.

THE COURT: That was with respect to the robbery. According to the testimony, she saw him a couple of times earlier unrelated to the robbery. Then she testified that the only time she saw him with respect to the robbery is the Friday before the robbery.

MR. KELLEHER: Granted, your Honor. That's the testimony was.

However, the jury is asking for this. They are going to be getting it out of context. They are not going to be getting it the way they got it the first time.

THE COURT: I don't see how anybody can be hurt by starting to read at line 8 on page 582. We have one page which is of probably no great importance.

MR. KELLEHER: From what, your Honor?

THE COURT: Line 8, "When was the first time you

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met the man called Cardine?"

b4 MR. KELLEHER: On 582 and then up to line 5 on 589?

THE COURT: Do you have any dispute as to where to stop?

MR. KELLEHER: I don't think so. Insofar as the direct, I think we can agree on 547, line 24 --

MR. SCHMUKLER: No objection, your Honor.

MR. KELLEHER: 547, line 24, which begins, "Did there come a time when you met someone else on Friday" and I think we can agree on going up to 552, line 18 with the answer, "About 11:30, 12 o'clock."

THE COURT: All right.

Everything else is agreed to, I take it? Have you written it down for the reporter?

MR. KELLEHER: Sure, your Honor. Then we come to Booker McLeod. The direct begins insofar as what happened when he comes out of the bathroom on page 229. The direct ends, your Honor, on page 233.

THE COURT: Hold it. 229 starting at line 15 or maybe even 12, my guess.

MR. KELLEHER: All right.

THE COURT: Through what?

MR. KELLEHER: The direct ends on line 17, your

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THE COURT: What page?

MR. KELLEHER: 233, your Honor.

With respect to the cross, the cross-examination of McLeod is peppered with reference to this incident.

MR. SCHMUKLER: The references, your Honor, is a gun, no further descriptive material than that.

THE COURT: Gun and hand is what they are interested in. Let's see what I can find in the cross in that regard.

MR. LEVNER: Your Honor, are we permitted to join in even though we came late?

THE COURT: Even though you came late.

MR. LEVNER: I would also like to include--

MR. KELLEHER: Is this Booth or McLeod?

MR. LEVNER: McLeod. I also would like to include the cross-examination by Mr. Levner of Mr. McLeod.

THE COURT: What pages?

MR. LEVNER: 233, line 20, describing the individuals carrying the weapons, gives a physical description of one of them, height. He claims he saw them, remembers the face, he could not identify the photo spread of the individuals. That's on 234, your Honor.

THE COURT: All right. We will have that.

MR. LEVNER: That goes on to 235.

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THE COURT: 235 also.

MR. LEVNER: 236, your Honor.

THE COURT: I think we stopped at the middle of 235, line 8.

MR. KELLEHER: They are talking about the hand gun, your Honor.

THE COURT: I am stopping now at line 8.

MR. LEVNER: How about page 239, lines 2 to 4?

THE COURT: 239?

MR. KELLEHER: Your Honor, for concise purposes, why don't we start on 229, line 12, read the direct, then read Mr. Levner's cross up to the bottom of 239.

THE COURT: All right.

MR. LEVNER: Maybe I better rethink that if Mr. Kelleher is agreeable to it.

THE COURT: That's all right if you want to do it that way.

MR. LEVNER: I see nothing wrong with it. I have no objection.

THE COURT: We go on to 240. 240 is more of what they are looking for, 240, line 7.

MR. LEVNER: Can we correct one word on the transcript? In the transcript it says, "I didn't get

a good lock." It should be "look."

THE COURT: Yes. That is line 6, page 240.

Will you write all this down for the reporter so he can do it?

MR. KELLEHER: Maybe we ought to run by it one more time, the whole thing.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Bring in the jury.

(Jury present.)

THE COURT: Ladies and gentlemen: I have your request for the reading of Pat Booth's testimony, April 30, Friday night, with K. Brown's arrival and testimony by McLeod coming out of bathroom, primarily a description of man with gun and hand.

The reporter will read that to you now.

(Record read.)

THE COURT: All right. The jury may retire and resume its deliberations.

(At 8:35 P.M. the jury returned to the jury room to continue their deliberations.)

(9:35 P.M. in open court; jury present.)

THE CLERK: Will the jurors please answer present as your name is called.

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(Jury roll called - all present.)

BY THE CLERK:

Q Mr. Foreman, has the jury agreed upon a verdict?

A (The Foreman) We have.

Q How do you find the defendant Eric Daniels on count 1?

A Guilty.

Q How do you find the defendant Eric Daniels on count 2?

A Guilty.

Q How do you find the defendant Eric Daniels on count 3?

A Guilty.

Q How do you find the defendant Eric Daniels on count 4?

A Guilty.

Q How do you find the defendant Don Daniels on count 1?

A Guilty.

Q How do you find the defendant Don Daniels on count 2?

A Guilty.

Q How do you find the defendant Don Daniels on count 3?

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A Guilty.

Q How do you find the defendant Don Daniels on count 4?

A Guilty.

Q How do you find the defendant Kenneth Brown on count 1?

A Guilty.

Q How do you find the defendant Kenneth Brown on count 2?

A Guilty.

Q How do you find the defendant Kenneth Brown on count 3?

A Guilty.

Q How do you find the defendant Kenneth Brown on count 4?

A Guilty.

THE COURT: Do the defendants wish the jury polled?

MRS. BARLOW: Yes.

MR. SCHMUKLER: Yes, your Honor.

(All jurors, upon being asked by the clerk: "Is that your verdict?" answered in the affirmative.)

THE COURT: Ladies and gentlemen: I can appreciate the time and effort you have put into your verdict. It's been a very hot night and it's late in the evening.